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Supreme Court, U.S.
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No. 02-563

In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

Pursuant to Rule 15.8 of the Rules of this Court, Respondents respectfully submit this Supplemental Brief in response to the Brief of the United States as Amicus Curiae ("U.S. Br."), which was filed on May 30, 2003, and Petitioners' Response to Brief of the United States as Amicus Curiae ("Pet. Supp. Br."), which was filed on June 5, 2003.

ARGUMENT

Petitioners' Supplemental Brief Further Demonstrates That There Is No Issue for Supreme Court Review

As we noted in our Brief in Opposition – and as the government[1] agrees – ACLA's petition for a writ of certiorari does not raise any issues meriting this Court's review. As the government states, the Court of Appeals "applied a legal standard for distinguishing 'true threats' from protected speech that is correct and consistent with this Court's decisions." (U.S. Br. 2) ACLA's supplemental brief – by focusing once again on its disagreement with the view of the facts taken by the jury, the District Court Judge, and the Court of Appeals *en banc* majority – only further demonstrates why certiorari review is not warranted here. As the government correctly points out, "[w]hether or not there is room for disagreement about [the Court of Appeals's] conclusion, this Court does not sit to review the lower courts' application of correctly stated legal standards." (U.S. Br. 16; *see* sources cited in Opp. 8, 27)

This Court's recent decision in *Virginia* v. *Black*, 123 S. Ct. 1536 (2003), further supports the denial of the petition in this case.

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[1] Despite ACLA's contention to the contrary, the government articulates an obvious interest in this case – it advances the same "true threats" standard enunciated and applied by the Court of Appeals "in its prosecutions under various threats statutes." (U.S. Br. 11-12; *see id.* at 9)

As in *Black*, the Court of Appeals held in this case that use of symbols to intimidate by threat of bodily injury is not constitutionally protected speech. *See id.* at 1548 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."); *accord* Pet. App. 41a ("Violence is not a protected value. Nor is a *true threat* of violence *with intent to intimidate*.") (emphasis in original)); *see also id.* ("Physicians' fear did not simply happen; ACLA intended to intimidate them from doing what they do.").

In their supplemental brief, petitioners mistakenly argue that *Black* supports their position that the Court should grant review to impose a subjective intent requirement as a matter of First Amendment law. As the government notes, there is no conflict of authority on the objective "true threats" standard[2] and, in any event, this case, like *Black*, involves a finding of subjective intent under the statute at issue. Specifically, under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, instructions given to the jury in this case, the jury was required to – and did – find that petitioners intended to intimidate respondents (with intimidation specifically defined to mean by threats of bodily injury). (Pet. App. 27a, 34a, 254a; Opp. 16-17; U.S. Br. 16-17)[3] As the government notes, the jury (and the District Judge) found subjective intent and, thus, there is no basis for certiorari review of an issue that would not affect the outcome of this case. (*See* U.S. Br. 10 ("The court of appeals' refusal to incorporate into its true threats standard a requirement that the speaker intended to make a threat could not have affected the outcome of this case. The FACE Act, the statute under which petitioners were held liable for their threats, requires that the defendant act with the intent to injure, intimidate, or interfere with a

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[2] Likewise, as discussed in both our Brief in Opposition and the government's brief, *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir. 1976), does not represent a conflict of authority with the threats standard applied by the Court of Appeals in this case. (Opp. 18-20; U.S. Br. 13)

[3] In their supplement brief, petitioners obfuscate the issue by failing to address the FACE elements instruction, and instead discuss only the "true threats" instruction.

person, and the jury was instructed in accordance with that requirement."))[4]

Petitioners also persist in their "format" argument, again without articulating a cognizable legal theory. As the government notes, the Court of Appeals did not adopt a "'novel notion of actionable threats' . . . To the contrary, the court adhered to the settled practice, reflected in this Court's decisions, of considering the entire context in which a communication is made in order to determine whether it is a true threat." (U.S. Br. 9; *see also id.* at 14 ("Petitioners' argument rests on the erroneous premise that the change in 'format' cannot produce a change in 'message.'"); *id.* at 14-15

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[4] ACLA's argument that the Court should adopt a subjective intent requirement for true threats also was not properly preserved below. In their initial jury instructions, petitioners supposedly "preserved for appeal" a specific intent argument by including a specific intent jury charge in a mass of proposed jury instructions that contained contradictory instructions on the standard of intent. But, petitioners *never* argued that the trial court should give the instruction. Indeed, at the final charge conference with the District Judge, ACLA's lead counsel stated with respect to the "true threats" instruction: "Yes, I never said -- I never said the test should be changed. . . . I am not arguing, your Honor, that the test should be changed." (1/25/99 Tr. 3123) Simply submitting a proposed instruction stating it is "preserved for appeal" is insufficient under well-settled rules of preservation. Fed. R. Civ. P. 51; *see, e.g.*, *Monroe* v. *City of Phoenix*, 248 F.3d 851, 858-59 (9th Cir. 2001). Moreover, to the extent that ACLA makes in its supplemental brief any statutory arguments under FACE, it should be noted that ACLA did not object before the trial court to the FACE elements instruction, including the element of intention to intimidate. (1/25/99 Tr. 3098, 3102) ACLA's failure to preserve its arguments for review is yet one more, independent reason for the Court to deny certiorari in this case. *See Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below."); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) ("We ordinarily will not decide questions not raised or litigated in the lower courts. That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction . . . ." (citation omitted)); *Sisson* v. *Ruby*, 497 U.S. 358, 359 n.1 (1990) ("We decline to consider that argument because it was not raised below.").

("There is nothing novel about a court's considering, as part of the context in which a communication was made, whether previous similar communications were followed by violence. It is self-evident that words or symbols that have come to be associated with violence may be particularly effective tools of intimidation. The Court recognized as much in *Virginia* v. *Black*.")

Further, despite ACLA's contention that the communications at issue "fall into the category of incitement, not threats" (Pet. Supp. Br. 6; *see* Pet. 16), there is no issue to be reviewed here either. Significantly, ACLA requested, and received, an instruction that explained the difference between threats and incitement theories, and emphasized that this was a threats, not an incitement case. (11/12/98 Tr. 27-28; 1/11/99 Tr. 767-68; Resp. App. 73a-74a; Opp. 22-23; *see also* U.S. Br. 17-18)

Finally, to the extent petitioners attempt to raise for the first time in their supplemental brief an argument that, under the First Amendment, an individual may only be held liable for threats if it is clear that he or his agent will personally carry out the threatened harm, that argument has not been properly presented for this Court's review. First, it is not one of the Questions Presented in the petition.[5] Moreover, the jury – and the Court of Appeals, upon conducting an independent review of the record – found that petitioners would be the source of the threatened harm. (Resp. App. 75a; *see e.g.*, Pet. App. 40a ("Physicians could well believe that ACLA would make good on the threat.")) Thus, as noted in the government's brief, "this case provides no occasion to consider" any such argument. (U.S. Br. 12 n.3; *see* Opp. 27 n.33)

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[5] ACLA also failed to include statutory FACE arguments among the Questions Presented in the petition. *See* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 202-03 (2002) (holding that a question not presented in the petition was "not properly before" the Court).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: June 12, 2003

Respectfully submitted,

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